STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

SANTANNA NATURAL GAS CORPORATION d/b/a SANTANNA ENERGY SERVICES	)	
	)	Docket No. 02-0441
Application for Certificate of Service Authority Under §19-110.	)	

INITIAL BRIEF OF THE CITIZENS UTILITY BOARD

PUBLIC VERSION

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Introduction

On or about June 27, 2002 Santanna Natural Gas Corporation d/b/a Santanna Energy Services ("Santanna" or "the company"), filed an application for a certificate of service authority pursuant to §19-110 of the Public Utilities Act ("the Act"). 220 ILCS 5/19-110(b). Prior to this, however, Santanna served as an alternative gas supplier in the NICOR Customer Select and Peoples/North Shore Gas Choices For You programs pursuant to the 180-day grace period contained in §19-110 (b) of the Act. *Id.*

Article XIX requires a supplier to possess "sufficient technical, . . . and managerial resources and abilities to provide the service for which it seeks a certificate of service authority." 220 ILCS 5/19-110(e)(1). The supplier must also certify its compliance with all state, federal and local laws. 220 ILCS 5/19-110(e)(2). Additionally, an alternative gas supplier must comply with the mandates of §19-115, which states in pertinent part:

> (c) An alternative gas supplier shall obtain verifiable authorization from a customer, in a form or manner approved by the Commission, before the customer is switched from another supplier.
> (f) An alternative gas supplier shall comply with the following requirements with respect to the marketing, offering and provision of products or services:
> (1) Any marketing materials which make statements concerning prices, terms and conditions of service shall contain information that

> adequately discloses the prices, terms and conditions of the products or services.
>
> (2) Before any customer is switched from another supplier, the alternative gas supplier shall give the customer written information that adequately discloses, in plain language, the prices, terms, and conditions of the products and services being offered and sold to the customer.
>
> (3) The alternative gas supplier shall provide to the customer: (A) itemized billing statements that describe the products and services provided to the customer and their prices . . . .

220 ILCS 5/19-115(c), (f)(1)-(3)(A).

On or about June 18, 2002 CUB filed a complaint with the Illinois Commerce Commission ("ICC" or "the Commission"), alleging that Santanna's solicitation and billing practices violate the above-referenced sections of the Act. The complaint was prompted by CUB's receipt of numerous customer complaints regarding Santanna's practice of billing residential customers for both actual summer and anticipated winter usage.[1] In addition to these complaints, customers also reported being switched from their incumbent supplier to Santanna without the customer's express authorization—a practice known as slamming. CUB Ex. 1.0, pp. 3-4, 11 (Kolata Direct); AG Ex. 1.00, pp. 6-7 (Hurley Direct); Staff Ex. 1.00, p. 7; AG Stipulated Ex. 1. Moreover, CUB received additional complaints pertaining to the customer's inability to contact Santanna representatives in order to gather information or cancel service, whether initially authorized or not. Ag Ex. 1.00, p. 7; Staff Ex. 1.00, p.6.

Santanna customers also filed complaints with the Attorney General's Office, the Illinois Commerce Commission, the Better Business Bureau, NICOR Gas, Peoples/North Shore Gas and Santanna itself. CUB Ex. 1.0 (Kolata Direct), Apps. 1-2; AG Ex. 1.00 (Hurley Direct), App. 1.01; AG Stip. Ex. 1 (SES ICC 298). *See also*, Apps. 3 and 5 of CUB's Motion To Stay. Indeed, Santanna's own records reflect more than 5,500 customer complaints/cancellations between

[1] ICC Docket No. 02-0425 Verified Complaint of the Citizens Utility Board, p.2, ¶4, filed June 18, 2002.

March and July 2002. AG Stipulated Ex.1 (SES ICC 298). The pattern of allegations contained in these complaints is consistent with that of the CUB complaints. *See generally,* AG Stip. Ex. 1 (SES ICC 298); CUB Cross Ex. 3 (SES ICC 257-258); Appendices 3 and 5 to CUB's Motion To Stay; Appendices 1 and 2 to CUB Ex. 1.0, (Kolata Direct).

While the company argues that it responded to these complaints (Tr. 70-72; Santanna Ex. 1.0 (Gatlin Rebuttal), pp. 7, 9, 12-13) the record reflects that such responses were dilatory at best. CUB Ex. 2.0, App. 1 (SES ICC 206-207); Tr. 180-182. At times the company's actions thwarted customers' ability to cancel service, obtain clearer information regarding the service offering or resolve a dispute. AG Stip. Ex. 1 (SES ICC 298); AG Ex. 1.0 (Hurley Direct), Appendix 1.01; Staff Ex. 1.00 (Howard Direct), p. 7 (complaints regarding inability to access Santanna via telephone). *See generally,* Appendices 3 and 5 to CUB's Motion To Stay; Appendices 1 and 2 to CUB Ex. 1.0, (Kolata Direct). As late as July 2002, Santanna refused to cancel customers by phone, and instead required customers to send a written letter of cancellation before actually terminating service. Thus customers were forced to take service for longer than was necessary. *See* AG Ex. 1.0 (Hurley Direct), Appendix 1.01; AG Stip. Ex. 1 (initial files contain copies of cancellation letters; penultimate file containing NICOR customer complaints repeatedly refers to waiting for customer's letter of cancellation).

Based upon the evidence adduced during the hearings on this matter, Santanna's actions violate the Public Utilities Act and demonstrate Santanna's managerial inability to serve as an alternative gas supplier in Illinois' emerging residential consumer choice market, and thus CUB opposes Santanna's receipt of a certificate of service authority. CUB recognizes and fully supports the need for a competitive residential natural gas marketplace. However, the

Commission must balance this need against Illinois consumers' need for and legal entitlement to protection from dubious marketing, enrollment and billing practices.

For the reasons set forth below, CUB respectfully requests that the Commission deny Santanna's application for a certificate of service authority.

ARGUMENTS & AUTHORITIES

I. Santanna's Managerial Resources And Abilities Are Insufficient

Section 19-110(e)(1) of the Act requires that an applicant for a certificate of service authority "possess sufficient technical, financial and managerial resources and abilities to provide the service for which it seeks" the certificate. 220 ILCS 5/19-110(e)(1). The record is replete with evidence that Santanna lacks the managerial resources and abilities to serve as an alternative gas supplier to residential customers in Illinois.

Santanna, by its own admission, modeled its residential marketing program after its commercial program. Tr. 116-122; Santanna Ex. 1.0, p. 6. It appears, however, that the company solely relied upon this knowledge and did little or nothing else to acquaint itself with all of the legal requirements for serving a residential market. First, Santanna does not comply with applicable state and federal laws regarding either telemarketing or door-to-door solicitations. Second, Santanna has consistently failed to adequately supervise its sales force, and to respond to frequent, repeated allegations of wrongdoing. Additionally, Santanna has failed to create appropriate materials for use in a residential marketing program.

A. Santanna's marketing practices do not comply with applicable state and federal laws

In accordance with §19-110 of the Act and 82 Ill. Adm. Code 551.20, Santanna certified that it is in compliance with all federal, state, regional and industry rules, and that it will comply with all other applicable rules and laws. 220 ILCS 5/19-110(e)(5), (f); Verified Petition of

Santanna Natural Gas Corporation. However, the record suggests that Santanna failed to thoroughly research applicable state and federal laws before initiating its "mass marketing" efforts. Tr. 65-66, 117-122. Also, by Santanna's own admission, the persons responsible for the development of marketing materials had no demonstrable experience in telephone or in-person solicitation in a residential market. Tr. 117-120. As a result, Santanna's marketing program fails to comply with the Illinois Public Utilities Act, the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act") and quite possibly the Federal Telemarketing and Consumer Fraud and Abuse Prevention Act as well.

1. Telemarketing

The scripts employed by Santanna demonstrate that the company either did not review relevant telemarketing laws, or chose not to adhere to them. Pursuant to §19-115 of the Act, Santanna's marketing materials are required to "adequately disclose the prices, terms and conditions of service." 220 ILCS 5/19-115(f)(1). However, not one of the four scripts used by Santanna from February 20, 2002 through July 22, 2002 complies with state law. Indeed only the final script, purportedly used from July 9th through July 22nd, appears to come close to compliance—although it too is deficient. All of the scripts similarly fail to adequately disclose the terms of the agreement between Santanna and the customer.

The first script, used from February 20 through May 17, 2002, contained no reference whatsoever to Santanna's storage program, manner/method of billing, $3.00 monthly administrative fee, cancellation policy, or early termination fee. (SES ICC 131-133). Moreover, the script instructs the marketer to ascertain confidential customer information, such as meter and account number, **prior** to disclosing the purpose of the call.

The second script, used from May 17 through July 17, 2002, slightly alters the first script and includes a reference to the administrative fee. However, there are no references to any other aspects of Santanna's program other than vague, alleged historical savings over NICOR's gas prices. CUB Cross Ex. 2 (SES ICC 008-010).

Santanna's third script, used from June 17th through July 9th, still fails to initially identify the purpose of the call. Santanna Ex. 1.0, App. 1.08 (Gatlin Rebuttal). Not once does the marketer explain that he or she is calling in order to enroll the consumer as a Santanna customer. *Id. See also,* Tr. 147. Like the others, this script also seeks to ascertain confidential information before the purpose of the call is stated. This script, used some four moths after the company began marketing, contains the very first mention of Santanna's storage program, albeit in the most minimal of terms. The script never explains that customers will see gas bills of more than double the price they are accustomed to in the summer months. It also creates confusion by asking for confidential information and stating, "since this is for Nicor Gas customers only" as though the customer would continue to be a NICOR customer.

The fourth Santanna script, used from July 9th through July 22nd [2], reflects the first and only time in a five-month marketing campaign that the marketer explains that Santanna is an alternative supplier under the Customer Select program. Santanna Ex. 1.0, App. 1.09. This script contains other "firsts" as well: the first mention of Santanna's cancellation policy; and the first request for permission to enroll the customer in Santanna's program. Not one of the previous scripts required the customer's permission to enroll. In fact, enrollment was just assumed, although not confirmed with the customer. Tr. 147. *See also,* Santanna Ex. 1.0, App. 1.08-1.09; CUB Cross Ex. 2 (SES ICC 008-010); (SES ICC 131-133).

[2] Santanna indicated that it stopped all marketing efforts as of July 31st but will continue to enroll customers if they contact the company directly. It is unclear which scripts would be used in such an instance.

Although the fourth script attempts to explain the storage program, this explanation remains vague and does not adequately disclose the "sticker shock" customers will likely feel upon receipt of their first bill.[3] While this script discloses that winter bills *should* be lower and summer bills *should* be higher, it does not explain that bills will be significantly higher, so much so that thousands of customers complained and attempted to cancel service. AG Stip. Ex. 1; AG Ex. 1.00 (Hurley Direct), pp. 6-7; Staff Ex. 1.00 (Howard Direct), pp. 6-7; CUB Ex. 1.0 (Kolata Direct), pp. 5, 10-11. Nor does it define which months Santanna considers "summer" or "winter" for purposes of the storage program. In other words, in exactly which months will customers see a higher or lower bill?

Despite the absence of these material terms, Santanna's CEO testified that these scripts were compliant with Illinois law. Tr. 137, 140, 150-151. However, at issue in the overwhelming majority of customer complaints received by Santanna is the company's alleged failure to disclose that in addition to actual therms used, Santanna bills in advance for anticipated gas usage.[4] (*See generally,* Appendices 3 and 5 of CUB's Motion To Stay; Appendices 1 and 2 to CUB Ex. 1.0 (Kolata Direct); AG Stipulated Ex. 1 (over 1,000 of the more than 5,500 customer complaints received by Santanna pertained to failure to disclose terms). Under cross-examination, Mr. Gatlin acknowledged that these terms were missing from Santanna's telemarketing scripts, but he nonetheless maintained that in their absence, customers were still adequately informed of Santanna's prices, terms and conditions of service. Tr. 150-151. A simple review of §19-115 would have revealed the company's obligation to disclose these terms to customers prior to switching their service. 220 ILCS 5/19-115(f).

[3] See CUB Cross Ex. 17 (SEC ICC 209).
[4] The company argues that it bills in a manner in accordance with Ill C.C. No. 16-Gas 5th Revised Sheet No. 75.6. However, nothing in the statute requires that customer's be billed for therms other than those used.

In addition to the Public Utilities Act, Santanna's failure to disclose material terms is also violative of the Illinois Telephone Solicitations Act which requires marketers to immediately identify themselves, the company they represent, the purpose of their call and whether the consumer consents to the solicitation. 815 ILCS 413/15(a), (b)(1)-(2). Santanna's mass marketing efforts failed to meet these standards. Not one of the first three scripts instructs the telemarketer to identify to the consumer the purpose of the call or to ascertain whether in fact the customer wishes to switch gas suppliers. Tr. 134. *See also*, Santanna Ex. 1.0 (Gatlin Rebuttal), Appendix 1.08- 1.09; CUB Cross Ex. 2 (SES ICC 008-110). Moreover, Santanna readily admits that the vast majority of its residential customers were enrolled pursuant to the first three scripts—the most deficient of the lot. Tr. 313-316.

Like Illinois law, federal law also requires telemarketers to disclose the identity of the company and the purpose of the call, as well as the nature of the service offering. 16 CFR Part 310.4(d). The federal Telemarketing and Consumer Fraud and Abuse Prevention Act requires telemarketers to disclose to prospective buyers, the total costs to "purchase, receive or use . . . services that are the subject of the sales offer." 16 CFR Part 310.3(1). Pursuant to this Act, marketers are prohibited from "misrepresenting, *directly or by implication* . . . any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer." *Id*. at Part 310.2 (ii). (Emphasis added).

In the instant case, Santanna's storage program is a condition of service, the total cost of which is not disclosed to customers in Santanna's telephone solicitations. Customers do not have the ability to choose a conventional billing option in which they would pay for the therms they use *as they use them*. Santanna's failure to disclose this condition leaves customers with the belief that they will be charged in the manner to which they have been accustomed to being

charged by their incumbent supplier. Nothing in Santanna's scripts prepares customers for being billed for far more therms than they use. This lack of information constitutes a deceptive telemarketing practice and is therefore violative of the Telemarketing and Consumer Fraud and Abuse Prevention Act.

2. Door-to-Door Marketing

Like its telemarketing efforts, Santanna's door-to-door solicitation efforts reveal the company's non-compliance with Illinois law. As stated above, the Public Utilities Act requires alternative gas suppliers to adequately disclose the terms, prices and conditions of service. 220 ILCS 5/19-115(f)(1). Santanna's door-to-door marketing (another component of its mass marketing efforts) failed to comply with state law.

Santanna maintains that it used identical scripts for telemarketing and door-to-door solicitations. Tr. 165. This is wholly contradicted by Santanna's contractual agreements with its door-to-door marketing representatives. AG Cross Ex. 4 (SES ICC 371, ¶10; SES ICC 374). Moreover, the telemarketing scripts are clearly intended for phone use, not in-person contact. *See generally*, Santanna Ex. 1.0 (Gatlin Rebuttal), App. 1.08 -1.09; CUB Cross Ex. 2 (SES ICC 008-010); (SES ICC 131-133). All notations on the scripts, including the title, indicate telephonic use, not in-person use, and regardless, the scripts are inconsistent with Illinois law, as demonstrated above. Similarly, the contracts used by Santanna's door-to-door representatives are also non-compliant with Illinois law.

CUB Cross Exhibit 15 consists of the five contracts supposedly used by Santanna during its door-to-door campaign from February 20, 2002 through the present.[5] Tr. 209, 214, 217, 219, 222. *See also*, CUB Cross Ex. 15 (SES ICC 001-007). The contracts are troublesome for

[5] Since Santanna allegedly terminated its mass marketing efforts on July 31, 2002, and only those customers who call Santanna directly can be enrolled, it follows then that the final contract is no longer in use, since telephonic enrollees do not actually sign contracts.

numerous reasons, *inter alia*, each contains different terms, thereby creating different obligations to different customers, and each omits essential terms in violation of state law.

The first Santanna contract (CUB Cross Ex. 15 (SES ICC 001)), entitled "Natural Gas Agreement," was used from February 20 through May 17, 2002. As demonstrated during the evidentiary proceedings, this contract contained no reference to Santanna's $3.00 monthly administrative fee, the storage program, or Santanna's practice of billing customers for anticipated therm usage. Each of these items constitutes a term, price or condition of service, but they are absent from the contract.

The contract further states, ". . .[t]his is the entire agreement between the parties. There are not promises, agreements, warranties, obligations, assurances or conditions precedent or otherwise affecting it." This is untrue. The omitted terms are additional conditions and obligations of service because Santanna offers customers no choice but to be billed in accordance with its storage program, even though it failed to disclose this program in its solicitation scripts and customer contracts. It is also worth noting that this contract obligates customers to take service from Santanna for a period of three years. Customers may cancel this service with "a minimum of 30 days notice" without incurring a penalty. *Id.* After 30 days, however, the agreement obligates customers to pay a fraction of the cost for **all** therms that would have been delivered to them over the course of the contract. *Id.* Given that the average NICOR customer consumes 1,200 therms per year, and the average Peoples Gas customer consumes approximately 1,300, an early termination fee pursuant to Santanna's terms could be quite costly.[6]

The second contract (CUB Cross Ex. 15 (SES ICC 002)) was allegedly used from May 1 through May 17, 2002. Once again, there is no reference to the monthly administrative fee or the storage program. Tr. 216. *See also*, CUB Cross Ex. 15 (SES ICC 002). In fact, according to

[6] Based upon information maintained by the ICC.

Santanna's President, "if it is not in the contract, then it shouldn't have been charged during that time period." Tr. 216. Unlike the previous contract, however, this one contains a "customer awareness" section, but the section fails to make customers aware of the actual terms of the agreement. Tr. 242-243. Moreover, the record indicates that in late June 2002 this section was scheduled to be modified, thus conflicting with Santanna's reported dates of usage. Tr. 243-245. *See also*, CUB Cross Ex. 14 (SES ICC 192); CUB Cross Ex. 17 (SES ICC 209). This contract, like the previous one, erroneously warrants that there are no additional terms to the agreement. Like the first, the second contains a cancellation policy, however, this one permits a customer to cancel for any reason within the first 90 days of service. CUB Cross Ex. 15 (SES ICC 002). After this period, the customer is subject to a cancellation fee of "$.03 per therm for the calculated deliveries seller would have made, during the time from buyers [sic] exit date throughout the remainder of this contract." (Not only has Santanna failed to provide a legal basis for such a provision, but also the company fails to include this detail in any of its telemarketing scripts). The contract also provides the customer with the option to extend the contract at the end of three years.

The third contract form, reportedly used from May 17 through July 8, 2002, contains the first reference to Santanna's monthly administrative fee. Tr. 218, 299. *See also*, CUB Cross Ex. 15 (SES ICC 003)). But like the previous forms, it contains no reference whatsoever to the storage program, Santanna's billing practice or any other essential terms as required by law. Also, like the previous two, this contract purports to be complete on its face despite the fact that essential terms are missing. This contract also contains the same cancellation clause as the second; however, this agreement purports to "automatically renew for successive (3) three year terms." *Id.*

From July 9 through July 15, 2002, Santanna used yet another contractual agreement with its customers. (CUB Cross Ex. 15 (SES ICC 004)). This fourth form permits customers to cancel within 60 days (after providing 30 days notice) and indicates that customers will be charged $100.00 if they cancel after this period. *Id.* This agreement "shall automatically renew month to month" at the expiration of the initial three-year service period. *Id.* As with the previous contracts, there is absolutely no mention of Santanna's storage program or billing practice.

Unlike all previous contracts, Santanna's fifth and final contract, purportedly used from July 15, 2002 to the present, does indeed contain a clause describing the storage program and other terms of service. Tr. 220-226. *See also,* CUB Cross Ex. 15 (SES ICC 005-007). (As more fully discussed below, this language is nonetheless insufficient under Illinois law). However, this effort is too little and comes too late for the majority of customers who enrolled with Santanna between February and early July.

In addition to the Public Utilities Act, Santanna's marketing efforts are also subject to the Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"), which governs Illinois business practices in general, and all door-to-door sales contacts in particular. 815 ILCS 505/2B. This Act requires that customers be informed of their right to cancel, within three days, any contract entered into with a sales representative who is present in the customer's home. *Id.* The Consumer Fraud Act further requires that customers be given a form (completed in duplicate) apprising them of this right. *Id.* The statute even provides sample cancellation language. *Id.*

Of the contracts utilized by Santanna, only one attempts to comport with this statutory standard. Tr. 232. *See also,* CUB Cross Ex. 15 (SES ICC 005-007). However, that contract, the

fifth one, was used for only a two-week period (July 15 through July 31)—more than five months after Santanna initiated its mass marketing campaign, and as Santanna admits, well after the majority of its prospective customers were enrolled. Tr. 314-316. Not only is Santanna's failure to include this clause inexcusable, particularly in light of the examples provided within the statute, but also Santanna's dilatory revision of existing contracts (to include this clause) is troubling. Ironically, Santanna copied the language contained in its three-day cancellation notice directly from the statute. The question remains, however, why did the company fail to do this at the onset of its marketing campaign? Why did it take five months for Santanna to realize and then act upon its legal obligations?

According to Mr. Gatlin, approximately four or five Santanna employees reviewed or revised the marketing materials, yet errors such as utilizing commercial contracts for its residential program went uncorrected for more than five months. Tr. 123-124. Indeed, four of the five contracts contain references to commercial customers, such as "Yes! I would like Santanna Energy Services to help my *company* control natural gas prices;" and "[b]uyer represents that they are financially able to continue *business* . . . ." Tr. 215-216, 217, 219-220

A reasonably prudent business would have thoroughly investigated all applicable laws and, at a minimum, had attorneys review their materials for compliance. These gaffes and those illustrated above, demonstrate Santanna's slipshod and perhaps hasty efforts to design a residential program without exercising appropriate diligence beforehand. Moreover, since the contracts contain different terms, Santanna now has a customer base with differing entitlements and agreements. There is no evidence that Santanna has kept track of the many different terms by which they are bound. In fact, the record demonstrates quite the opposite. Tr. 225-229.

Given this disorganization customers cannot be sure that the specific terms to which they have agreed will actually be honored. This is indicative of poor managerial oversight, carelessness and a disregard for the seriousness of the company's obligation to Illinois consumers.

B. Santanna Fails to Adequately Supervise Its Sales Force

Santanna engaged the services of numerous telemarketing and door-to-door solicitation firms[7] for its mass marketing efforts. The record reflects that the company lacks the managerial ability to adequately supervise these firms, particularly with respect to training, verification of sales, and use of marketing materials. Supervision was equally poor for telemarketers and door-to-door sales representatives. This lack of oversight, coupled with Santanna's deficient marketing materials, contributed to the enormous number of customer cancellations and complaints received by various state agencies and the company itself. By all accounts, Santanna was aware by mid-June that there were significant problems in its marketing materials, contracts and sales force, but the company was unable to fully identify and correct them.

1. Training

Santanna acknowledges that it does not participate in the training programs conducted by its marketers, other than to provide scripts or other written materials. Tr. 156. Santanna indicated that it "cannot detail all the procedures used by the telemarketers" or "describe the training procedures in detail." Santanna Ex. 1.0 (Gatlin Rebuttal), Appendix 1.17 (Response to JH 1.10). Similarly, Santanna claims that it "cannot detail all the procedures used by the door-to-door sales companies" or describe their training programs in detail. *Id.* at pp. 20-21 (Response to JH 1.16). The company further acknowledges that its quality assurance essentially consists of

[7] Consumer Choice Inc., Philadelphia, PA; Consumer Sales Solutions, Inc., Dunedin, FL; Contact Centers Unlimited, Minneapolis, MN; CTC Teleservices, Oak Brook, IL; Customer Acquisition Specialists of America, Inc., Clearwater, FL; Ecom Support Centers, Jacksonville, NC; Energy Marketing Services, Inc., Salem, NH; Energy Marketing Group, Clearwater, FL; Midwest Marketing Group, Fremont, NE; S & D Marketing, Inc., Philadelphia, PA. AG Cross Ex. 4.

frequent e-mail and telephonic contacts with the marketing companies, and "randomly" listening to telemarketing calls. *Id.* However, under cross-examination, Mr. Gatlin was unable to explain how frequently "randomly" is; nor did he know whether Santanna maintains records of the times during which it listens in on telemarketing calls. Tr. 158. Santanna's lack of knowledge regarding the manner and quality of its representatives' training is of great concern. Without this, the company cannot ensure uniformity or consistency in the representatives' contacts with prospective customers. Further, Santanna's limited oversight was completely insufficient; particularly in light of the number and scope of customer complaints the company received regarding slamming, and the failure of salespeople to fully and adequately explain the terms of service.

2. *Telemarketing*

Santanna fails to adequately supervise its telemarketing sales force. As illustrated above, the company claims to have randomly listened to calls for quality assurance purposes but there is no real evidence of this having occurred. Moreover, a standard method of telemarketing quality assurance, third-party verification, was not even implemented until four months after initial marketing campaign began. This was well after numerous complaints had already been generated. CUB Cross Ex. 6, 17 (SES ICC 201; SES ICC 209-214); AG Stip. Ex. 1.

According to its contractual agreements, Santanna was responsible for providing its telemarketers with scripts for use in sales calls. AG Cross Ex. 4 (SES ICC 371, ¶10, SES ICC 374). As set forth above, the scripts were replete with inadequate and confusing information, or in most instances, the scripts completely lacked essential terms and conditions of service. See discussion supra, p. __. There is no doubt that Santanna's biggest problems began with its own

poorly drafted materials. However, the company's failure to better monitor its telephone sales also contributed to its unsuccessful marketing effort.

Many of the customer complaints pertain to misleading/confusing telemarketing. CITE. AG Stip. Ex. 1 (approximately 1,050 complaints of inadequate disclosure or misrepresentation). Also, many of the slamming complaints detailed instances in which the customers simply asked for additional information regarding the company but were switched to Santanna without expressing intent to do so. *Id.* Other complaints allege that the telemarketer informed the customer that he or she had to take action in order to remain with their incumbent utility. Staff Ex. 1.00, p. 7 (Howard Direct); AG Stip. Ex. 1. *See generally*, Apps. 3 and 5 to CUB's Motion To Stay; Apps. 1 and 2 to CUB Ex. 1.0 (Kolata Direct). Appropriate oversight, such as randomly listening in on calls and post-sale verification could have decreased these infractions.

Although Santanna's verification scripts are dated from February through July, the company's internal documents suggest that this means of quality assurance was not always used with every telemarketing company. For example, in a message from Doug Cueller, Santanna Vice President of Midwest Operations, to Richard Cormier of EMS, Santanna states, " . . . with the next complaint, regardless of what it is, we are going to require taped verification for every sale that you make." CUB Cross Ex. 6 (SES ICC 201). That same message was conveyed to Eric Hudson of CCI. CUB Cross Ex. 17 (SES ICC 209-214). The messages are dated June 27 and June 28 respectively, more than four months after Santanna's marketing campaign began. *Id.*

Even more disturbing than Santanna's dilatory implementation of verification procedures, is the company's own unfamiliarity with its agents' quality control procedures. CUB Cross Ex. 17 (SES ICC 210). In fact, as late as June 26, 2002, Santanna misunderstood exactly how customer complaints and sale verifications were handled by CCI. *Id.* at SES ICC 210-214.

Santanna's Vice President of Midwest Operations had already assured Santanna's corporate offices that CCI was utilizing taped verifications for every call, when in fact this was not the case. *Id.* at SES ICC 211. CCI's internal quality assurance process did not involve tape recording follow-up customer calls. *Id.* at 210-211. Indeed, CCI indicated that not only did it not tape every call, but also it removed complaint/cancellation requests from its files before forwarding copies of those files to Santanna. *Id.* at 210. CCI also pleaded with Santanna not to implement verifications since this would drive down CCI's profit margin. *Id.* at 209.

Based on the foregoing, Santanna failed to exercise adequate supervision over its telemarketers. Its failure to implement quality assurance measures upon creation of its program, coupled with its unawareness of those measures utilized by its agents is indicative of poor management.

3. Door-To-Door Sales

In addition to the demonstrated problems with its telemarketing efforts, Santanna also failed to adequately supervise its door-to-door sales force. Santanna's door-to-door campaign was riddled with complaints of egregious wrongdoings. According to Santanna's contractual agreements, its door-to-door marketing firms were responsible for generating sales scripts for Santanna's ultimate approval. AG Cross Ex. 4 at SES ICC 371, ¶10; SES ICC 374. However, Santanna has offered no proof of how and when this was actually done. In fact, the company has offered no scripts. Instead Santanna contends that the same scripts were used for both sales efforts. This is simply unsupported by the record and the actual scripts themselves. *See* discussion, *supra*, §IA1.

a. Contracts

During discovery, Santanna produced five contract forms purportedly used by its marketers, including the feet on the street ("FOS") during door-to-door customer enrollments. CUB Cross Ex. 15 (SES ICC 001-007). In response to a request for copies of signed customer contracts, Santanna provided copies of approximately 38 copies of signed agreements. CUB Cross Ex. 16 (SES ICC 221-251); CUB Cross 18 (SES ICC 290-297). But, by the company's own admission, these forms appear to have been altered by its marketers, and then not reviewed by Santanna. Tr. 233-240; 302-304. A fact that provides further evidence of Santanna's managerial inadequacy.

First and foremost, the signed contracts are not those forms produced by Santanna during discovery—the FOS used four additional contract forms beyond those purportedly approved by Santanna. CUB Cross Ex. 16 (SES ICC 221-251); Tr. 233-240. Second, the signed contracts do not match the usage dates for the forms produced by Santanna. Third, Santanna alleges that the contracts used by the FOS are not the company's contracts. Tr. 302-304. Aside from the legal issues created by the contractual deficiencies described above, the fact that Santanna's representatives were enrolling customers using contracts not previously reviewed or approved by Santanna further illustrates the company's lack of supervisory oversight and managerial ability. *See* discussion *supra*, §IA2. No matter how Santanna attempts to shift the blame for this blunder to its marketers, Santanna remains liable for the actions of its agents.

The forms used to enroll customers *** *** do not appear in those produced by Santanna. CUB Cross Ex. 16 (SES ICC 221, 229, 230); CUB Cross Ex. 15. Moreover, given the dates that each customer allegedly consented to take service from Santanna, June 28, June 6 and April 23, 2002, their contracts should have been on forms identified by Santanna as SES ICC 003, 003 and 001 respectively. *Id. See also,* Tr. 234-235. Similarly, the customers identified in

CUB Cross Exhibits 16 and 18 (SES ICC 222-226, 231-235, 237-244, 246, 248-249, 290-297) were enrolled using a form that was allegedly not produced by Santanna. Tr. 302-304. Those customers, given their enrollment dates, should have been enrolled on SES ICC 003.[8] Six other customers were enrolled on yet another form of which Santanna was similarly unaware. CUB Cross Ex. 16 (SES ICC 227, 237, 245, 247, 251); Tr. 234-240.

Ironically, Santanna claims that its second contract contained a "customer awareness" section, which provided space for customers to initial and acknowledge their understanding of certain terms of Santanna's service offer. CUB Cross Ex. 15 (SES ICC 002). *See also*, discussion *supra*, §IA2. According to the company this form was used only for a two-week period from early to mid-May. Tr. 213-214. However, FOS enrolled customers using a similar, but by no means identical, form on dates ranging from May 17th, through June 21st. CUB Cross Ex. 16 (SES ICC 222-226, 231-235, 237-244, 246, 248-249); CUB Cross Ex. 18 (SES ICC 290-297). Santanna's President states that he is "not aware that we drafted a contract with that customer awareness section in it," (Tr. 303) but, this contradicts earlier testimony in which he acknowledged that SES ICC 002, which does in fact have a customer awareness section, was indeed a Santanna contract. Tr. 242-245. *See also*, Tr. 213-217.

Santanna's lack of knowledge concerning the materials used by its representatives is indicative of its unacceptable oversight. Not only were different customers once again enrolled under different terms, but also Santanna claims to not have created or reviewed the contract forms. Not only does this indicate poor supervision, but also it demonstrates that the marketing companies were free to alter materials at will, without Santanna's approval or awareness.

b. Posing as NICOR

[8] This is true for all but the customer identified at SES ICC 240. Given his enrollment date of May 17, 2002, according to Santanna's own records the customer should have signed either of the forms identified as SES ICC 001, 002 or 003. Tr. 240.

In his pre-filed testimony, Mr. Gatlin states that " . . . the alleged instances of a sales representative posing as a NICOR employee, to my knowledge, was limited to a single person, and I've never even been able to confirm that." Santanna Ex. 1.0, p. 15. However, the record reflects numerous complaints of Santanna representatives posing as NICOR representatives. See CUB Cross Ex. 3-6; Appendices 3 and 5 of CUB's Motion To Stay; Appendices 1 and 2 of CUB Ex. 1.0; Staff Ex. 1.00, p. 7; AG Stip. Ex. 1. Indeed, under cross-examination, Mr. Gatlin acknowledged evidence of at least six different Santanna representatives allegedly posing as NICOR representatives. Tr. 165-172. Moreover, the record also reflects that these individuals represented two of Santanna's door-to-door marketing companies, Consumer Choice Inc. ("CCI") and Energy Marketing Services, Inc. ("EMS"). Tr. 173. According to Santanna's own documents, these companies are located in two different parts of the country (Philadelphia and New Hampshire, respectively) and have no common denominator other than Santanna. AG Cross Ex. 4. Santanna offers no explanation for how this deceptive practice was permitted to occur. Nor does the company explain how it is that representatives from two totally different companies would arrive at the same means of securing customers on Santanna's behalf.

Not only did Santanna permit this practice to occur, but once notified of the allegations, Santanna permitted the practice to continue. According to an internal e-mail a Santanna manager states:

> "**This issue may now be at the attention stage** - we have indicated for a month now that the FOS[9] represent themselves as Nicor Employees [sic], and tell the customer that if the [sic] hand over their Nicor Invoice they will save money."

CUB Cross Ex. 9 (SES ICC 206) (Emphasis in the original). The message continues, ". . .the customers continue to tell us that the cute FOS person – said they were from Nicor, and this is

[9] "FOS" stands for feet on the street, Santanna's term for its door-to-door sales force. Tr. 164.

only reason 1) handed over their bill. and Enrolled [sic]."[10] *Id.* The message concludes with "[n]ot sure how much longer we want to continue with this sales trick." which indicates that Santanna endorsed this ploy as a means of securing customers. CUB Ex. 2.0, App. 1 (SES ICC 207).

Regardless of Santanna's intentions, the company had full knowledge of this deceptive practice as early as May 23, 2002. Tr. 182; CUB Cross Ex. 10 (SES ICC 165). It was raised again on June 18th and June 27, nearly a month later. Tr. 167-181; CUB Cross Ex. 6, 9. So despite threats to terminate its relationship with CCI, Santanna continued to permit the company to secure new customers on its behalf. Tr. 182.

c. Gas Bills

In addition to posing as NICOR representatives, the record reflects that Santanna marketers frequently asked customers for copies of their gas bills under the guise of performing a rate analysis or determining how to save the customer money. CUB Cross Ex. 3 (SES ICC 257-258); Appendices 3 and 5 to CUB's Motion To Stay; Appendices 1 and 2 of CUB Ex. 1.0; AG Stip. Ex. 1; AG Ex. 1.0 (Hurley Direct) , App. 1.01. This is significant in light of the number of slamming complaints, i.e., customers switched without their consent. *Id.* Customer's gas bills contain the very information needed to switch their service from an incumbent to an alternative supplier—a name, address, meter and account numbers. Tr. 186-187.

Mr. Gatlin intimated that these customers either fabricated their complaints or claimed slamming as a means of getting out of their Santanna agreement. Santanna Ex. 1.0 (Gatlin Rebuttal), p. 13. However, the fact that sales representatives were taking customer's bills supports the allegations contained in numerous customer complaints. The record reflects that in late June Santanna asked both CCI and EMS to stop promising customers that Santanna would

[10] All errors are in the original document.

mail their gas bills back. CUB Cross Ex. 11-12 (SES ICC 190-191). Thus, Santanna was aware that its representatives were engaging in this practice, but at no point did Santanna instruct the marketers to stop doing so. Tr. 186. In fact, Santanna's President testified that asking for a customer's bill was probably done on a "routine basis from the beginning." Tr. 185. There is no support for this practice in any of Santanna's scripts, contracts or other materials. Why then would the company tolerate this practice?

Posing as a utility representative coupled with taking the customer's bill under the pretense of rate analysis or rate reduction is fraud. Santanna's failure to immediately demand a stop to this conduct, or cease doing business with the offending companies is simply inexplicable and indicative of its lack of managerial ability and supervisory control of its sales representatives.

d. Survey/Rebate/Petition

CUB, the AG and the Commission received numerous customer complaints alleging that Santanna representatives asked customers to sign a survey or petition for purposes of a rate reduction, rebate, or a rate quote. CUB Ex. 2.0, App. 1 (SES ICC 173, 182-183, 185); Staff Ex. 1.00, p. 7; Santanna Cross Ex. 5; AG Ex. 1.0 (Hurley Direct), pp. 6-7. *See generally* Appendices 3 and 5 to CUB's Motion To Stay; CUB Ex. 1.0, App. 1 and 2. Santanna's own documents, and those of its agents, reflect these same allegations. CUB Ex. 2.0, App. 1 (SES ICC 173, 182-183, 185); CUB Cross Ex. 3 (SES ICC 257-258); AG Stip. Ex. 1. Despite Santanna's efforts to discredit the slamming complaints, the "survey" allegations are entirely consistent with that pattern of complaints. At issue in these complaints is whether the consumer intended to enroll as a Santanna customer. Where an individual was induced to sign a contract under the guise of signing a survey, petition or other form he or she cannot legitimately be

deemed a Santanna customer. In light of the number and scope of allegations, Santanna cannot argue, based upon the customer's signature alone, that he or she intended to sign a service contract.

Like the instances of Santanna representatives posing as NICOR employees, the record reflects that "survey" complaints surfaced as early as May (CUB Cross Ex. 3 (SES ICC 257-258)), yet Santanna took no action to distance itself from the offending marketers. Tr. 182. This is inadequate managerial oversight.

e. Identification

Numerous customers have reported representatives wearing NICOR identification badges or no identification at all. CUB Ex. 2.0, App. 1 (SES ICC 173, 185) AG Stip. Ex. 1; Apps. 3 and 5 to CUB's Motion To Stay; CUB Ex. 1.0 (Kolata Direct), Apps. 1 and 2. Santanna argues that its representatives are required to wear a pin that indicates they are not a utility employee. Santanna Ex. 1.0, p. 14. However, the record reflects that Santanna cannot attest to what its marketers actually wore or did in the field. Tr. 198. In fact, Santanna's assertions are based solely upon what has been relayed to it by the marketing companies in writing or in photos, not upon Santanna's personal knowledge. *Id.*

4. Failure To Address Problems

Mr. Gatlin opines, "I think we demonstrated in several different places that we didn't have any tolerance for people staying in the program if they were operating outside the guidelines of the program." Tr. 181. Against the backdrop of Santanna's continued tolerance of repeated complaints regarding CCI sales people, this statement rings hollow. The record reflects that Santanna's contract with CCI permitted Santanna to give CCI 14 days to cure any defects in its marketing of Santanna's services. AG Cross Ex. 4 (SES ICC 370, ¶ 4). At no point did

Santanna do so. The contract further allowed Santanna to terminate its relationship with CCI upon 30 days' notice. *Id.* Despite threats to terminate the relationship in early May, (CUB Cross 10, (SES ICC 165), Santanna took no steps to stop doing business with CCI until Santanna ended its marketing program on July 31, 2002. Tr. 182.

The fact that Santanna's marketing efforts were conducted by third parties does not shield the company from liability. Well-accepted principles of agency deem the principal liable for the acts of its agents. Regardless of whether the door-to-door salespeople were supposed to convey particular information, Santanna is ultimately liable for the impression and expectation that its agents actually create in potential customers. *Opp v. Wheaton Van Lines, Inc*., 231 F.3d 1060, 1065 (7th Cir. 2000) quoting *Weil, Freiburg & Thomas, P.C. v. Sara Lee Corp*., 218 Ill. App. 3d 383, 577 N.E.2d 1344, 1350 (1991). ("Apparent authority arises when a principal creates, by its words or conduct, the reasonable impression in a third party that the agent has the authority to perform a certain act on its behalf.") Accordingly, Santanna is legally bound by the acts of its marketing agents.

II. THE COMMISSION LACKS STATUTORY AUTHORITY TO CONDITION SANTANNA'S APPLICATION

ICC Staff has proposed that in the event the Commission chooses to issue Santanna a certificate of service authority, it should be contingent upon compliance with certain Commission-imposed conditions, i.e. call center requirements, creation of a remedial action plan and Commission review of all printed materials "in order to ensure that the Corporation is managerially qualified." Staff Ex. 1.00, pp. 10-11 (Howard Direct). Article XIX of the Public Utilities Act does not authorize the imposition of such conditions. Further, the Commission's need to ensure Santanna's managerial qualifications, in and of itself, indicates that Santanna does

not currently possess the requisite qualifications. Thus, Santanna cannot be certified in accordance with the Public Utilities Act.

Although Staff cites no authority for the imposition of conditions, 83 Ill. Adm. Code 551.100, provides in pertinent part:

> "The Commission may impose such terms and conditions as deemed necessary in order to insure the applicant is managerially qualified, commensurate with the anticipated scope of the service to be provided and customers to be served."

83 Ill. Adm. Code 551.100(c). But, despite the existence of this emergency rule, the actual law contains no such language. *See generally* 220 ILCS 5/19-110 et. seq. Staff also relies upon rules pertaining to alternative retail electric suppliers, but currently there are no analogous rules pertaining to alternative gas suppliers, as Staff readily admits. Tr. 523-525.

Staff testimony alludes to the Commission's concern with the effect of denying Santanna's application upon the nascent residential gas market. Staff Ex. 1.0, p. 5 (Howard Direct). However, of equal, if not greater import, is the impact upon consumers if the Commission grants Santanna a conditional certificate. While there may be a limited number of competitors in Illinois at this time, to permit suppliers to defraud customers and continue soliciting new business without penalty sends the entirely wrong signal to the both the business community and more importantly, Illinois consumers. The Commission’s response to companies that defraud the public, whether intentionally or not, must be clear—such behavior will not be tolerated. The response must be to force them to cease and desist immediately, and to critically address the issue of whether they should be licensed at all.

The nascent state of natural gas competition provides even more reason to protect other competitors whose practices are compliant with state law. The Seventh Circuit has upheld a Federal Trade Commission finding that where a company uses deceptive marketing, whether

intentionally or not, which other companies operating under the same statutory requirements do not use, the offending company "has an unfair advantage over its competitors." *Montgomery Ward & Co. v. the Federal Trade Commission*, 379 F.2d 666, 672 (7th Cir. 1967). Santanna's practice of purchasing gas in the summer for use in the winter months is a common practice in the natural gas industry; however, Santanna's practice of billing customers for this advanced purchase, particularly *without* notifying them first, is not.[11] Thus, by enrolling nearly 52,000 customers[12] without disclosing this fact to them, Santanna has essentially gained a competitive edge over other alternative gas suppliers participating in the Customer Select and Choices For You programs. Santanna's actions are a negative reflection upon the customer choice program and must be treated as such.

Conclusion

Based on the foregoing, CUB respectfully requests that Santanna's certificate of service authority be denied. As competition begins in Illinois it is important that consumers have confidence that the companies doing business here are not only reputable but reliable. Otherwise, customers will be unwilling to venture into the market. Santanna's actions are inconsistent with the Illinois law and therefore the Commission should deny its application.

Respectfully submitted,

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Dated: September 20, 2002

[11] ICC Docket No. 02-0425, CUB's Verified Complaint, ¶13.
[12] Santanna Ex. 1.0, p. 20 (Gatlin Rebuttal).

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